

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

WATERKEEPER ALLIANCE, INC., et al.,  
Plaintiffs,  
v.  
U.S. ENVIRONMENTAL PROTECTION  
AGENCY, et al.,  
Defendants.

Case No. [18-cv-03521-RS](#)

**ORDER GRANTING MOTION TO  
REMAND**

This is one of several cases filed in various United States District Courts throughout the nation challenging rules promulgated by the United States Environmental Protection Agency and the United States Army Corps of Engineers that define “waters of the United States” for purposes of applying the Clean Water Act, *see e.g., Conservation Law Foundation v. United States Environmental Protection Agency*, No. 1:20-cv-10820 (D. Mass.); *Pascua Yaqui Tribe v. United States Environmental Protection Agency*, 4:20-cv-00266 (D. Ariz.), including another case pending in this court, *State California v. Regan*, 3:20-cv-3005 RS (N.D.Cal.).

Defendants seek voluntary remand to the agencies and dismissal of this case. Plaintiffs oppose remand unless the current rule is vacated. The issue of whether vacatur is warranted or not appears to be moot, however, given that the *Pascua Yaqui* court issued an order on August 13, 2021 vacating the rule.

Were it still necessary to reach the issue, this court would not be inclined to impose vacatur. Plaintiffs’ argument that vacatur is appropriate in light of defendants’ supposed

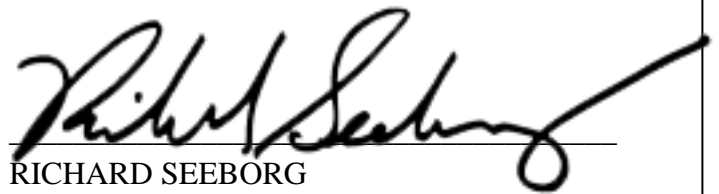
1 acknowledgement of “legal error” embodied in the present rule is not persuasive. Defendants do  
2 not concede the rule is legally impermissible, and in *California v. Regan*, this court concluded the  
3 plaintiffs were unlikely to succeed on the merits in showing such legal error. Rather, defendants  
4 appear to be reconsidering the rule for policy reasons. While it is within defendants’ discretion to  
5 modify their policies and regulatory approaches, and it may ultimately resolve some or all of  
6 plaintiffs’ objections to the current rule, there has been no evaluation of the merits—or concession  
7 by defendants—that would support a finding that the rule should be vacated.

8 Intervenor Chantell and Michael Sackett oppose remand as to one specific provision —  
9 relating to “adjacent wetlands” — which they contend the agencies would lack discretion to  
10 eliminate or substantially revise on remand. The Sackett’s argument, however, rests on their  
11 position that the four-justice plurality opinion in *Rapanos v. United States*, 547 U.S. 715, 126  
12 S.Ct. 2208 (2006) is controlling. The Ninth Circuit has recently rejected that very claim by the  
13 Sacketts. *Sackett v. U.S. Env’t Prot. Agency*, 8 F.4th 1075, 1091 (9th Cir. 2021)(“For all these  
14 reasons, the Sacketts’ arguments fail . . . the Kennedy concurrence is still the controlling opinion  
15 from *Rapanos*.”)

16 Accordingly, the motion to remand is granted. The Clerk shall close the file.

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18 **IT IS SO ORDERED.**

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20 Dated: September 16, 2021

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22 RICHARD SEEBORG  
23 Chief United States District Judge  
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